

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation**

NOTICE OF PROPOSED RULEMAKING

**Subject Matter of Proposed Amendments to Regulations:
Workers' Compensation – Audit Regulations**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTIONS 10104, 10107.1, and 10111.2**

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in him by Labor Code Sections 59, 129, 129.5, 133 and 5307.3, proposes to adopt the amended and proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The Department of Industrial Relations, Division of Workers' Compensation, proposes to adopt:

Amended section 10104	Annual Report of Inventory
Amended section 10107.1	Notice of Audit; Claim File Selection; Production of Claims Files; Auditing Procedure
Amended section 10111.2	Full Compliance Audit Penalty Schedule; Target Audit Penalty Schedule

PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, oral or in writing, with respect to the subjects noted above, on the following dates:

Date: July 15, 2003
Time: 10:00 am to 5:00 PM or conclusion of business
Place: Gov. Hiram W. Johnson State Office Building, Auditorium
455 Golden Gate Avenue
San Francisco, California 94102

The State Office Building and its Auditorium are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other type of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the State Wide Disability Accommodation Coordinator, Adel Serafino, at 1-866-681-1459 (toll free), or through the

California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation. If public comment concludes before the noon recess, no afternoon session will be held.

The Administrative Director requests, but does not require that, any persons who make oral comments at the hearings also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Workers' Compensation. The written comment period closes at **5:00 p.m., on July 15, 2003**. The Department of Industrial Relations, Division of Workers' Compensation will consider only comments received at the Department of Industrial Relations, Division of Workers' Compensation by that time. Equal weight will be accorded to oral comments presented at the hearing and written materials.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Marcela Reyes
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

Written comments may be submitted by facsimile transmission (FAX), addressed to the above-named contact person at (415) 703-4720. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwcrules@dir.ca.gov.

Unless submitted prior to or at the public hearing, Ms. Reyes must receive all written comments no later than 5:00 p.m. on July 15, 2003.

AUTHORITY AND REFERENCE

Labor Codes sections 59, 133 and 5307.3 authorize the Administrative Director to adopt or amend regulations and to enforce the laws. Labor Code sections 129 and 129.5 authorize the Administrative Director to audit and impose penalties against claims administrators who fail to meet their obligations to promptly and accurately provide injured workers with the compensation to which they are entitled. The proposed regulations will further implement, interpret or make specific Labor Code sections 129 and 129.5.

INFORMATIVE DIGEST AND POLICY OVERVIEW

The Administrative Director of the Division of Workers' Compensation proposes the following amended regulations concerning the audit of workers' compensation claims.

Amended section 10104 Annual Report of Inventory

This regulation currently provides that the Self-Insurer's Annual Report may be substituted for the Annual Report of Inventory. However, the Self-Insurer's Annual Report does not set forth the number of indemnity claims (as defined as claims in which indemnity has been paid), medical only files or denial files. Therefore, if a Self-Insurer substitutes the Self-Insurer Annual Report for the Annual Report of Inventory, the audit unit is unable to determine the sample size of files to be audited, is unable to plan and schedule the audits in advance, and is not provided with the information necessary to determine the size of the adjusting location. Therefore, Section 10104 will be amended to delete the statement that the Self-Insurer's Annual Report could be substituted for the Annual Report of Inventory.

Amended section 10107.1 Notice of Audit; Claim File Selection; Production of Claims Files; Auditing Procedure

This section describes the process for conducting audits on or after January 1, 2003, in order to comply with the legislative changes made to Labor Code sections 129 and 129.5 effective January 1, 2003. It sets forth the procedure for noticing an audit and the sampling methodology for selecting the claims that will be audited. The section sets forth the procedure for calculating the audit subject's profile audit review performance rating. The section provides the method to determine the profile audit review performance rating of each audit and to establish a profile review audit performance standard each year. Those who meet or exceed the performance standard will not be assessed any administrative penalties; however, they will be issued Notices of Compensation Due pursuant to section 10110.

This section also provides the procedure for conducting Full Compliance Audits and the sampling methodology for selecting the claims that will be audited. The section sets forth the procedure for calculating the audit subject's full compliance audit performance rating and determining the full compliance audit performance standard each year.

The proposed revision to this section is to subdivision (c)(A)(v). This subdivision is the fifth factor in the procedure for calculating the audit subject's profile review performance rating and full compliance audit performance rating. The proposal is to delete the qualifying phrase "once the employees' injuries have reached a permanent and stationary status" as the language is unnecessary and may be confusing, since the notice advising injured employees of the process for selecting Agreed Medical Examiners and/or Qualified Medical Examiners is due with the denial of permanent disability and indemnity.

Amended section 10111.2 Full Compliance Audit Penalty Schedules; Target Audit Penalty Schedule

Section 10111.2 sets forth the audit penalty schedules in compliance with the requirements of Labor Code section 129.5. This section applies to audits conducted on or after January 1, 2003. However, for violations in claims with dates of injury between January 1,

1990 and December 31, 1993, penalty amounts may not exceed the amounts that would be assessed pursuant to section 10111. For violations in claims with dates of injuries between January 1, 1994 and December 31, 2002, penalty amounts may not exceed the amounts that would be assessed pursuant to section 10111.1. The penalty amounts in proposed section 10111.2 are based on the type of violation, taking into consideration the lateness of an act or the monetary value of the failure to act.

Section 10111.2 will be amended to include a \$50 penalty for late paid self-imposed increased (which was due on the same date as the late paid indemnity payment); to delete the penalty reference to self-imposed increases from subsection (a)(8); to include a penalty for late subsequent indemnity payment; and to include a penalty for failure to comply with an award of the WCAB or Rehabilitation Unit which is not assessed pursuant to subdivision (a)(10).

STATE MANDATED LOCAL COSTS; REIMBURSEMENT

The Administrative Director has determined that the proposed regulations will not impose any new mandated program on local agencies and school districts. The California Supreme Court has determined that an increase in workers' compensation benefit levels does not constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. See County of Los Angeles v. State of California (1987) 43 Cal.3d 46. The requirements imposed on all employers by these proposed regulations, although not a benefit level increase, similarly do not constitute a new State mandate because the regulations apply to all employers, private and public, and not uniquely to local governments.

DETERMINATION OF DISCRETIONARY COSTS ON LOCAL AGENCIES

The proposed regulations may impose discretionary costs on local agencies and school districts. Any such costs, however, will be non-discretionary because the requirement that every employer comply with the requirements of California's workers' compensation laws is a statutory obligation. Furthermore, any such costs are non-reimbursable because the requirement for employers to comply with California's workers' compensation laws is not unique to local agencies or school districts and applies to all employers alike, public and private, including the State of California.

COST OR SAVINGS TO STATE AGENCIES

The proposed regulations may impose costs on State agencies. (State government accounts for about 3% of the occupational injuries and illnesses.) Any such costs are, however, are non-reimbursable since the requirement on an employer to comply with California's workers' compensation laws is not unique to State agencies and applies to all employers alike, public and private. However, pursuant to the regulations, there are no penalties for audit subjects that meet or exceed the profile audit review performance standards.

COST OR SAVINGS IN FEDERAL FUNDING TO STATE

The proposed regulations will not affect any federal funding.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The Administrative Director has concluded that the amended regulations will not have a significant statewide adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states.

POTENTIAL COST IMPACT ON REPRESENTATIVE PRIVATE PERSONS OR DIRECTLY AFFECTED BUSINESSES

The Administrative Director has determined that the amended regulations will not have a significant adverse economic impact on representative private persons or directly affected businesses.

The entities directly affected by the regulations which allow for increase audit penalties are those which administer workers' compensation claims in California. This includes three types of private businesses: (1) employers who are large and financially secure enough to be permitted to self-insure their workers' compensation liability and who administer their own workers' compensation claims; (2) private insurance companies which are authorized to transact workers' compensation insurance in California; and (3) third party administrators which are retained to administer claims on behalf of self-insured employers or insurers.

ECONOMIC IMPACT ON SMALL BUSINESSES

The Administrative Director has determined that small business will not be impacted by the amended regulations. The businesses that are subject to audit penalties for failure to comply with the workers' compensation regulations are insurers, self-insured employers (who must by regulation have substantial net worth and income) and third party administrators, all of whom do not qualify as "small business."

ASSESSMENT OF EFFECTS ON JOB AND/OR BUSINESS CREATION, ELIMINATION OR EXPANSION

The Administrative Director has determined that the proposed regulations will likely have no net effect on the creation or elimination of existing businesses within California, or affect the expansion of current California businesses.

IMPACT ON HOUSING COSTS

The proposed regulations will have no effect on housing costs.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Administrative Director's attention would be more effective in carrying out the purpose for which the actions are proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The Administrative Director invites interested persons to present statement or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE / INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

As of the date of this notice, the rulemaking file consists of the notice, the initial statement of reasons, the proposed text of the regulations in strikeout/underline format, and the Form 399.

In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Division's website at www.dir.ca.gov.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Department of Industrial Relations, Division of Workers' Compensation, 455 Golden Gate Avenue, 9th Floor, San Francisco, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed regulations, initial statement of reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

CONTACT PERSON

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Marcela Reyes
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The telephone number of the contact person is (415) 703-4600.

BACKUP CONTACT/PERSON CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact person:

Department of Industrial Relations

Destie Overpeck
Industrial Relations Counsel
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The telephone number of the backup contact person is (415) 703-4600.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the website: www.dir.ca.gov

AUTOMATIC MAILING

A copy of this Notice, the Initial Statement of Reasons, and the text of the regulations, will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted, the regulations as amended will appear in Title 8, California Code of Regulations, Sections 10104, 10107.1, and 10111.2.